

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

GARY LAVELL HANSON,

Appellant.

No. 33532-8-II

UNPUBLISHED OPINION

PENoyer, J. -- Gary Hanson appeals from his convictions for first degree trafficking in stolen property and second degree possession of stolen property. He also moves for accelerated review of his sentence. A commissioner of this court referred Hanson's motion for accelerated review to a panel of judges, to be considered along with his appeal of his convictions. Concluding that Hanson's stolen property conviction must be dismissed but that the trial court did not err in calculating his offender score, we reverse and remand for further proceedings.

On September 25, 2004, the owner of Ram Auto and Truck Repair discovered that someone broke into one of his vehicles and stole a number of tools, including three air tools valued at \$300 each. On September 29, Hanson pawned those three tools at Tumwater Pawnbrokers, telling the pawnbroker that he had purchased the tools. A Lacey Police officer, who was investigating the burglary, found the tools at Tumwater Pawnbrokers and turned them

over to Detective Miller. Detective Miller interviewed Hanson on October 5. According to Detective Miller, Hanson said that he bought the tools from Jeffrey Heinz, a methamphetamine dealer, for \$150, knowing they had been stolen.

The State charged Hanson with first degree trafficking in stolen property and second degree possession of stolen property. At trial, Hanson admitted that he bought the tools from Heinz for \$150, but denied knowing that they had been stolen. He denied that he told Detective Miller he knew the tools had been stolen when he bought them.

A jury convicted Hanson as charged. His criminal history included the following convictions:

<u>Crime</u>	<u>Sentencing Date</u>	<u>Type</u>
Theft in the Second Degree	04/06/88	Felony
DWLS in the First Degree	04/28/93	Misdemeanor
Assault in the Fourth Degree	04/09/96	Misdemeanor
DWLS in the First Degree	07/11/97	Misdemeanor
Assault in the Fourth Degree	10/25/01	Misdemeanor
Unlawful Possession of Methamphetamine	01/22/02	Felony

Clerk's Papers (CP) at 48, 52. From this history, the trial court calculated Hanson's offender score as three, one for each of the prior felony convictions and one for the other current offense. With an offender score of three, Hanson's standard sentence range was 13 to 17 months for the trafficking conviction and 2 to 6 months for the possession of stolen property conviction. The court sentenced Hanson to 15 months and 6 months, respectively, and made the sentences

concurrent.

First, Hanson argues that double jeopardy bars his conviction for both first degree trafficking in stolen property and second degree possession of stolen property under *State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995). The State concedes that under *Calle*, double jeopardy bars Hanson's conviction for second degree possession of stolen property because neither crime has an element not contained in the other and because the legislature has not authorized separate punishment for the two crimes. We accept the State's concession and remand to the trial court to vacate the possession of stolen property conviction and to eliminate the other current offense from Hanson's offender score.¹

Second, in his motion for accelerated review, Hanson argues that the trial court erred in including his 1988 felony conviction in his offender score. He contends that because he spent five years in the community without being convicted of any felonies, his 1988 conviction washed out under former RCW 9.94A.360(2) (1992), *State v. Cruz*, 139 Wn.2d 186, 985 P.2d 384 (1999), and *State v. Smith*, 144 Wn.2d 665, 30 P.3d 1245 (2001). However, under *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004), for crimes committed after June 13, 2002, the trial court must include previously washed out convictions in an offender's criminal history. Hanson committed his crime on September 29, 2004. The trial court did not err in including his 1988 felony conviction in his offender score.²

¹ Because we vacate the conviction, we need not address Hanson's argument that the information charging him with that crime was constitutionally defective under *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991).

² Because the trial court did not err in including the 1988 conviction in Hanson's offender score, we need not address his argument that his counsel provided ineffective assistance by not challenging the State's calculation of his offender score.

We remand to the trial court to vacate Hanson's conviction for second degree possession of stolen property and to resentence Hanson with an offender score of two.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

PENoyer, J.

We concur:

HOUGHTON, P.J.

ARMSTRONG, J.